

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LEE REED and LYNELLE REED,

Plaintiffs,

v.

CITY OF ASOTIN and JAMES
MILLER,

Defendants.

NO: 11-CV-0469-TOR

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT is Defendants' Motion for Summary Judgment (ECF No. 28). This matter was heard with oral argument on January 11, 2013. Jay P. Manon appeared on behalf of the Plaintiffs. Michael E. McFarland, Jr. appeared on behalf of the Defendants. The Court has reviewed the motion, the response, and the reply, and is fully informed.

BACKGROUND

Plaintiff Lee Reed ("Plaintiff"), the former Chief of Police for the City of Asotin Police Department, has sued the City of Asotin and its Mayor, James

1 Miller, for various causes of action arising from his separation from the police
2 force in May 2009. Defendants have moved for summary judgment on each of
3 Plaintiff's claims.

4 FACTS

5 Plaintiff served as the Chief of Police of the City of Asotin Police
6 Department from January 1, 2005, to May 14, 2009. His duties in this position
7 included making recommendations to the Mayor concerning the hiring, termination
8 and discipline of police officers; assigning tasks and shifts to subordinates;
9 evaluating the performance of subordinates; evaluating the department's training
10 needs; ensuring departmental compliance with rules and regulations; developing
11 departmental policies and procedures; assisting in the preparation of the
12 department's budget; performing financial analysis and cost controls; evaluating
13 complaints and grievances against officers; attending meetings of the City Council
14 and Public Safety Committee; and meeting with public officials and members of
15 the general public. ECF No. 42 at ¶ 4. In short, Plaintiff was "the face of the
16 police department." ECF No. 42 at ¶ 5.

17 Due to the small size of his department, Plaintiff was also required to
18 "perform[] all police functions" and "act[] as a glorified patrol officer." ECF No.
19 42 at ¶ 4. His duties in this capacity included conducting investigations,
20 performing traffic enforcement, and performing community service and/or

1 community policing. ECF No. 42. According to Plaintiff, these duties consumed
2 60% of his time.

3 From January 1, 2005 until September 10, 2008, the City of Asotin Police
4 Department was staffed by Plaintiff and one other full-time officer. On September
5 10, 2008, the City hired a third full-time officer. ECF No. 42 at ¶7. The hiring of
6 this additional officer prompted the City to create a Civil Service Commission
7 pursuant to RCW Chapter 41.12. The Civil Service Commission was ratified by
8 the City Council on October 27, 2008. ECF No. 42 at ¶ 8. On April 27, 2009, the
9 City Council appointed three members of the public to serve as members of the
10 Civil Service Commission. ECF No. 42 at ¶ 10.

11 On May 14, 2009, Plaintiff tendered his resignation to the City of Asotin's
12 mayor, Defendant James Miller, in lieu of being terminated. The reasons for
13 Plaintiff's resignation are not entirely clear; it appears, however that it was
14 prompted, at least in part, by complaints which had been lodged against him by
15 members of the public. Plaintiff's dissatisfaction with Defendant Miller's level of
16 supervision may also have played a role in his decision to resign. In any event, the
17 reasons why Plaintiff resigned are not directly at issue. What is at issue is whether
18 Plaintiff was required to seek redress before the Civil Service Commission before
19 filing this lawsuit. It is undisputed that he did not do so.

DISCUSSION

A court may grant summary judgment in favor of a moving party who demonstrates “that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A fact is “material” within the meaning of Rule 56(a) if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A “genuine dispute” over any such fact exists only where there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party. *Id.* at 248.

The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the non-moving party has the burden of proof at trial, the moving party need only demonstrate an absence of evidence to support the non-moving party’s claims. *Id.* at 325. The burden then shifts to the non-moving party to “set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. In deciding whether this standard has been satisfied, a court must construe the facts, as well as all rational inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 327, 378 (2007).

1 **A. Minimum Wage Act Claim**

2 Defendants seek summary judgment on Plaintiff's claim for violation of
3 Washington's Minimum Wage Act ("MWA") on the ground that Plaintiff is
4 statutorily exempt from the MWA's wage and hour provisions by virtue of having
5 been employed in an administrative and/or executive capacity. Plaintiff, for his
6 part, maintains that the administrative and executive exemptions do not apply
7 because he spent 60% of his time performing routine police activities such as
8 writing tickets, making arrests, and patrolling streets. Lee Aff., ECF No. 36, at ¶ 1.

9 The MWA excludes from its definition of an "employee" anyone who is
10 "employed in a bona fide executive, administrative, or professional capacity . . . as
11 those terms are defined and delimited by rules of the director [of the Department of
12 Labor and Industries]." RCW 49.46.010(3)(c). The Department of Labor and
13 Industries, in turn, has promulgated regulations which specify when the
14 administrative and executive exemptions apply. For the reasons discussed below,
15 the Court finds that both exemptions apply.

16 1. Administrative Exemption

17 The administrative exemption is set forth in WAC 296-128-520. This
18 regulation provides, in relevant part:

19 The term "individual employed in a bona fide . . . administrative . . .
20 capacity" in RCW 49.46.010[(3)(c)] shall mean any employee:

1 (1) Whose primary duty consists of the performance of office or
2 non-manual field work directly related to management policies
or general business operations of his employer or his employer's
customers; [and]

3 * * * * *

4 (3) Who customarily and regularly exercises discretion and
5 independent judgment; and

6 (a) Who regularly and directly assists a proprietor, or an
employee employed in a bona fide executive or
7 administrative capacity (as such terms are defined in this
regulation), or

8 (b) Who performs under only general supervision work
9 along specialized or technical lines requiring special
training, experience or knowledge, or

10 (c) Who executes under only general supervision special
11 assignments and tasks; and

12 (4) Who does not devote more than 20 percent . . . of his hours
13 worked in the work week to activities which are not directly
and closely related to the performance of the work described in
14 paragraphs (1) through (3) of this section; and

15 (a) Who is compensated for his services on a salary or fee
basis at a rate of not less than \$155 per week exclusive of
board, lodging, or other facilities; or

16 (b) Who, in the case of academic administrative
17 personnel is compensated for his services as required by
paragraph (4)(a) of this section, or on a salary basis
18 which is at least equal to the entrance salary for teachers
in the school system, educational establishment, or
19 institution by which he is employed: Provided, That an
employee who is compensated on a salary or fee basis at
20 a rate of not less than \$250 per week (exclusive of board,
lodging, or other facilities), and whose primary duty

1 consists of the performance of office or non-manual work
2 directly related to management policies or general
3 business operations of his employer or his employer's
4 customers; which includes work requiring the exercise of
5 discretion and independent judgment, shall be deemed to
6 meet all of the requirements of this section.

7 WAC 296-128-520.

8 The Department of Labor and Industries has also issued a policy statement
9 which is intended to clarify the scope of this regulation. *See* Wash. Dep't of Labor
10 and Industries, *Exemption from Minimum Wage and Overtime Requirements for*
11 *Administrative Positions*, Administrative Policy ES.A.9.4 (June 24, 2005). This
12 policy statement contains a "short test" for applying WAC 296-128-520:

13 The administrative exemption contains a special proviso in the latter
14 part of WAC 296-128-520(4)(b) after the word "Provided" for
15 employees who are compensated on a salary or fee basis at a rate of at
16 least \$250 per week exclusive of board, lodging, or other facilities.
17 Under this proviso, the requirements for exemption will be deemed to
18 be met by an employee who 1) receives the \$250 per week on a salary
19 or fee basis; **2) the employee's primary duty consists of the**
20 **performance of office or nonmanual work directly related to**
management policies or general business operations of the
employer or the employer's customers; and 3) duties include work
requiring the exercise of discretion and independent judgment. If an
employee qualifies for exemption under this proviso, it is not
necessary to test the employee's qualifications in detail under the long
test.

Administrative Policy ES.A.9.4 at ¶ 3, 5, 9 (emphasis added).

In this case, the parties disagree about whether Plaintiff satisfies the
"primary duty" element of the test given that he spent 60% of his time

1 performing “routine police work.” Fortunately, the policy statement issued
 2 by the Department of Labor and Industries provides substantial guidance on
 3 this issue:

4 **How to Determine Primary Duty.** Primary duty must be based on
 5 all facts in the particular case. Generally, 50% is a good rule of
 6 thumb[,] but is not the sole test. There may be situations where the
 7 employee does not spend over 50% of his or her time in
 8 administrative duties, but [will] still be exempt if other pertinent
 9 factors support such a conclusion. Pertinent factors might include the
relative importance of the administrative function compared with
other duties performed in which the employee exercises discretionary
 powers, freedom from supervision, etc.

9 * * * * *

10 **Directly Related to Management Policies or General Business**
 11 **Operations of the Employer or Employer’s Customers.** This
 12 phrase describes those types of activities relating to the administrative
 13 operations of a business as distinguished from production or[] sales
 14 work in a retail or service establishment. In addition to describing the
 15 types of activities, the phrase limits the exemption to persons who
perform work of substantial importance to the management or
operation of the business of his employer or his employer’s
 16 customers. This must be considered on a case-by-case basis to
 17 determine [whether] this applies.

16 * * * * *

17 “Directly related to management policies or general business
 18 operations” includes those who participate in the formulation of
management policies, or in the operation of the business as a whole,
 19 and includes those whose work affects policy or whose work it is to
execute and carry the policy out.

20 Administrative Policy ES.A.9.4 at ¶ 5, 9 (underlined emphasis added).

1 As illustrated by the excerpts above, the Department of Labor and Industries
2 has interpreted WAC 296-128-520 to apply to employees who play a significant
3 role in creating and/or enforcing management policies. Although the precise
4 amount of time an employee spends performing management-related work versus
5 non-management-related work is a relevant consideration, it is not dispositive. As
6 articulated by the Department of Labor and Industries, the most important
7 consideration is the relative importance of the employee's management-related
8 responsibilities to the functioning of the employer as a whole. This construction of
9 the regulation is entitled to substantial deference by this Court. *See Silverstreak,*
10 *Inc. v. Washington State Dep't of Labor and Indus.*, 159 Wash.2d 868, 884-85
11 (2007) ("[W]e will give great deference to an agency's interpretation of its own
12 properly promulgated regulations, 'absent compelling indication' that the agency's
13 regulatory interpretation conflicts with legislative intent or is in excess of the
14 agency's authority. We give this high level of deference . . . because the agency
15 has expertise and insight gained from administering the regulation that we, as the
16 reviewing court, do not possess.").

17 Here, Plaintiff's management-related duties were clearly central to the
18 successful management and operation of the City of Asotin Police Department. As
19 the Chief of Police, Plaintiff was responsible for, *inter alia*, developing policies
20 and procedures for the police department; organizing and assigning tasks to

1 subordinates; issuing oral and written directives to subordinates; evaluating the
2 performance of subordinates; making recommendations to the mayor concerning
3 the promotion and discipline of subordinates; evaluating the department's training
4 needs; preparing periodic reports of the department's activities for the mayor;
5 participating in the preparation of police department budgets; performing financial
6 analysis regarding cost controls; attending meetings of the City Council and the
7 public safety committee; and meeting with elected or appointed officials and other
8 members of the general public. ECF No. 42 at 2-4. Although performing these
9 duties accounted for only 40% of Plaintiff's work hours (presumably due to the
10 small size of his department), there is no dispute that Plaintiff was singularly
11 responsible for managing and operating the department. Accordingly, Plaintiff
12 falls within the administrative exemption.

13 2. Executive Exemption

14 The executive exemption is set forth in WAC 296-128-510. This regulation
15 provides, in relevant part:

16 The term "individual employed in a bona fide executive . . . capacity"
17 in RCW 49.46.010[(3)(c)] shall mean any employee:

18 (1) Whose primary duty consists of the management of the
19 enterprise in which he is employed or of a customarily
20 recognized department or subdivision thereof; and

(2) Who customarily and regularly directs the work of two or
more other employees therein; and

1 (3) Who has the authority to hire or fire other employees or
2 whose suggestions and recommendations as to the hiring or
3 firing and as to the advancement and promotion or any other
change of status of other employees will be given particular
weight; and

4 (4) Who customarily and regularly exercises discretionary
5 powers; and

6 (5) Who does not devote more than 20 percent . . . of his hours
7 worked in the work week to activities which are not directly
and closely related to the performance of the work described in
paragraphs (1) through (4) of this section . . .; and

8 (6) Who is compensated for his services on a salary basis at a
9 rate of not less than \$155 per week exclusive of board, lodging,
and other facilities: Provided, That an employee who is
10 compensated on a salary rate of not less \$250 per week
(exclusive of board, lodging, or other facilities), and whose
11 primary duty consists of the management of the enterprise in
which he is employed or of a customarily recognized
12 department or subdivision thereof, and includes the customary
and regular direction of the work of two or more other
13 employees therein, shall be deemed to meet all of the
requirements of this section.

14 WAC 296-128-510.

15 As with the administrative exemption, the Department of Labor and
16 Industries has issued a policy statement which is intended to clarify the scope of
17 this regulation. See Wash. Dep't of Labor and Industries, *Exemption from*
18 *Minimum Wage and Overtime Requirements for Executive Positions*,
19 Administrative Policy ES.A.9.3 (June 24, 2005). This policy statement contains a
20 "short test" for applying WAC 296-128-510:

1 The executive exemption contains a special proviso in the latter part
2 of WAC 296-128-510(6) after the word “Provided” for employees
3 who are compensated on a salary basis at a rate of at least \$250 per
4 week exclusive of board, lodging or other facilities. Under this
5 proviso, the requirements for exemption will be deemed to be met by
6 any employee who 1) receives the \$250 per week in salary; **2) his or
7 her primary duty consists of the management of the enterprise in
8 which he/she is employed or of a customarily recognized
9 department or subdivision of the enterprise**, and 3) includes the
10 customary and regular direction of the work of two or more
11 employees. If an employee qualifies for exemption under this
12 proviso, it is not necessary to test the employee’s qualifications in
13 detail under the long test.

14 Administrative Policy ES.A.9.3 at ¶ 3 (emphasis added).

15 Plaintiff satisfies the second element of this test for many of the same
16 reasons that he satisfied the second element of the administrative exemption test.
17 As discussed above, Plaintiff’s management-related duties were crucial to the
18 successful management and operation of the Asotin Police Department. Although
19 his management-related duties did not consume a majority of his time, they were
20 nevertheless his “primary duties” within the meaning of WAC 296-128-510. *See*
Administrative Policy ES.A.9.3 at ¶ 4 (explaining that “the relative importance of
the [employee’s] managerial duties as compared with other types of duties” is a
pertinent factor when considering whether an employee who spends less than 50%
of his or her time performing managerial duties qualifies for the executive

1 exemption). Accordingly, the executive exemption applies.¹ Defendants' motion
2 for summary judgment on Plaintiff's MWA claim is granted.

3 **B. Violation of Civil Service Rules Claim (Wrongful Discharge)**

4 Plaintiff's Amended Complaint lists a cause of action for "Wrongful
5 Termination Violation of Civil Service Rules." ECF No. 8 at 4. The precise
6 nature of this claim is unclear. On one hand, the Amended Complaint alleges that
7 Defendant City of Asotin violated RCW Chapter 41.12 by failing to create a Civil
8 Service Commission Committee within ninety days of hiring a third police officer
9 to its police force. *See* ECF No. 8 at ¶¶ 23-24. On the other hand, the Amended
10 Complaint alleges that Defendants violated the Civil Service Rules by failing to
11 afford him a civil service hearing prior to his termination. *See* ECF No. 8 at ¶¶ 28,
12 32. Plaintiff's memorandum in opposition to the instant motion further obfuscates
13 the nature of his claim by referencing a claim for wrongful termination in violation
14 of public policy under Washington common law. *See* ECF No. 34 at 4. In light of
15 this uncertainty, the Court will limit its analysis to the issues specifically raised by
16

17 ¹ Although neither party has raised the issue, it appears that the executive
18 exemption would only apply *after* September 10, 2008, the date on which the
19 Asotin Police Department hired Officer Mike McGowan, raising the number of
20 Plaintiff's subordinates from one to two.

1 Plaintiff in opposition to Defendants' motion for summary judgment: (1) whether
2 Plaintiff was subject to the Asotin Civil Service rules (including the requirement
3 that he exhaust his administrative remedies prior to filing suit); and (2) if so,
4 whether he has a viable claim for wrongful discharge in violation of public policy
5 (a claim to which the administrative exhaustion requirement does not apply).

6 1. Plaintiff Was Subject to the Civil Service Rules

7 Plaintiff asserts that there is a genuine issue of material fact as to whether he
8 was subject to the Asotin Civil Service rules, and, by extension, required to
9 exhaust his administrative remedies. His lone argument in support of this assertion
10 is that the Asotin City Attorney, Scott Broyles, advised the Asotin City Council
11 during a meeting on November 10, 2008, that Plaintiff would continue to be an at-
12 will employee following the creation of the Asotin Civil Service Board. ECF No.
13 34 at 4; ECF No. 38 at 7, ¶ 5(b). Plaintiff acknowledges that Mr. Broyles'
14 statement was "contrary to law," but maintains that it excuses his failure to exhaust
15 his administrative remedies before the Civil Service Commission. ECF No. 34 at
16 4-5.

17 This argument is unavailing. As Defendants correctly note, the application
18 of RCW Chapter 41.12 to Plaintiff is a question of law rather than a question of
19 fact. Here, the applicable law is clear: as a full-time employee of a police
20 department with fewer than six commissioned officers, Plaintiff was a member of

1 the classified civil service. RCW 41.12.050(1) (“For police departments with
2 fewer than six commissioned officers, including the police chief, the classified
3 civil service and provisions of this chapter includes all full paid employees of the
4 department of the city, town, or municipality.”). Accordingly, Plaintiff was
5 required to exhaust his administrative remedies before the Asotin Civil Service
6 Commission prior to filing this lawsuit. *Allstot v. Edwards*, 116 Wash. App. 424,
7 430-31 (2003). Given that he did not do so, Defendants are entitled to summary
8 judgment.

9 2. Plaintiff Does Not Have a Viable Wrongful Discharge Claim

10 Plaintiff further asserts, apparently for the first time, that he was not required
11 to exhaust his administrative remedies before the Asotin Civil Service Commission
12 because he was wrongfully discharged in violation of public policy. *See* ECF No.
13 34 at 4 (“[W]hen a civil service commission has no mechanism for resolving
14 claims for wrongful constructive discharges, a claimant will not be required to
15 exhaust administrative remedies”). While it is true that Plaintiff was not required
16 to exhaust his administrative remedies before filing a claim for wrongful discharge
17 in violation of public policy, *see Allstot*, 116 Wash. App. at 433, there are no
18 genuine issues of material fact to support such a claim in this case.

19 To prevail on his wrongful discharge claim, Plaintiff must prove “(1) the
20 existence of a clear public policy (the *clarity* element); (2) that discouraging the

1 conduct in which he engaged would jeopardize the public policy (the *jeopardy*
2 element); (3) that the public-policy-linked conduct caused the dismissal (the
3 *causation* element); and, finally, (4) that the defendant has not offered an
4 overriding justification for the dismissal (the *absence of justification* element).”
5 *Cudney v. ALSCO, Inc.*, 172 Wash.2d 524, 529 (2011) (emphasis in original)
6 (internal quotations, citations and modifications omitted).

7 Further, because Plaintiff resigned his employment (as opposed to having
8 been formally terminated), he must prove that he was constructively discharged.
9 *See Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wash. App. 34, 43 (2008)
10 (“A cause of action for wrongful discharge in violation of public policy may be
11 based on either express or constructive discharge.”) (internal quotation marks
12 omitted). To prove constructive discharge, Plaintiff must establish that (1)
13 Defendant engaged in deliberate conduct which made his working conditions
14 intolerable; (2) a reasonable person in his position would have been forced to
15 resign; (3) he resigned solely because of intolerable working conditions; and (4) he
16 suffered damages. *Allstot*, 116 Wash. App. at 433; *Short v. Battle Ground Sch.*
17 *Dist.*, 169 Wash. App. 188, 206 (2012). Intolerable working conditions may arise
18 from “aggravating circumstances or a continuous pattern of discriminatory
19 treatment” on the part of the employer. *Allstot*, 116 Wash. App. at 433. “Whether
20 working conditions are intolerable is a question of fact and is not subject to

1 summary judgment unless there is no competent evidence to establish the claim.”

2 *Id.*

3 Here, Plaintiff contends that his working conditions were rendered
4 intolerable by Defendant Miller’s “micromanaging of the police department,” and
5 by his “having to be on call 24/7.” ECF No. 34 at 4. Contrary to Plaintiff’s
6 assertions, these two circumstances do not amount to “aggravating circumstances
7 or a continuous pattern of discriminatory treatment” for purposes of establishing
8 intolerable working conditions. *See Allstot*, 116 Wash. App. at 433. First, there is
9 no evidence that this treatment of Plaintiff was *discriminatory* in nature. Rather,
10 from the evidence presented, it is reasonable to assume that a significant amount of
11 oversight by the Mayor and/or burdensome on-call duties were simply attendant to
12 Plaintiff’s position as the Chief of Police. Similarly, these circumstances are by no
13 means “aggravating.” Again, being “micromanaged” by a top elected official and
14 being “on call 24/7” are simply some of the unpleasant realities of serving as the
15 Chief of Police in a small community. The Court finds that Plaintiff has failed to
16 present competent evidence in support of his wrongful discharge claim and that no
17 rational jury could find in his favor on the facts presented. *Allstot*, 116 Wash. App.
18 at 433. Accordingly, Defendants are entitled to summary judgment.

C. Washington Public Records Act Claim

Defendants seek summary judgment on Plaintiff's claim under the Washington Public Records Act ("PRA") on two separate grounds. First, Defendants assert that Plaintiff failed to file the claim within the two year "catch-all" statute of limitations applicable to such a claim. Second, Defendants argue that the documents at issue were beyond the scope of the materials described in Plaintiff's original public records request. For the reasons discussed below, both arguments fail.

1. Statute of Limitations

The statute of limitations on a PRA claim in Washington is either one or two years, depending upon the nature of the claim. A one-year statute of limitations applies to claims which are based upon (1) a state agency's claim of exemption from the PRA's disclosure requirements; or (2) an agency's "last production of a record on a partial or installment basis." RCW 42.56.550(6). A two-year statute of limitations applies to all other PRA claims. *Tobin v. Worden*, 156 Wash. App. 507, 514 (2010); *Johnson v. State Dep't of Corr.*, 164 Wash. App. 769, 777 (2011). Defendants concede that the two-year statute of limitations applies in this case. ECF No. 29 at 19.

Here, there is no dispute that Plaintiff failed to file the instant lawsuit within two years of Defendant's June 16, 2009 response to his PRA request. However,

1 Plaintiff maintains that the two-year statute of limitations on his claim was
2 effectively tolled until approximately March or April of 2011,² when he discovered
3 that Defendant had failed to produce the documents at issue. The Court agrees.
4 Although there do not appear to be any reported cases directly applying the so-
5 called “discovery rule” to PRA claims, applying the rule to the circumstances
6 presented here is entirely reasonable. Plaintiff had no reason to suspect that any
7 documents had been omitted from Defendant’s June 16th disclosure until he
8 stumbled upon *additional* documents obtained from Defendant by a third party.
9 By logical extension, Plaintiff could not have filed the instant PRA claim until he
10 discovered that these additional documents existed and that they had not been
11 produced. Accordingly, the Court concludes that the two-year statute of
12 limitations began to run sometime after March 18, 2011. Plaintiff’s PRA claim,
13 which was filed on March 9, 2012, is therefore timely.

14
15
16 ² The record does not establish the precise date on which Plaintiff discovered the
17 existence of the two documents in question. Plaintiff testified during his
18 deposition that he discovered the documents in approximately March or April of
19 2011 after Defendant produced them to a third party on March 18, 2011. *See* ECF
20 No. 38 at Tr. 172-78.

1 2. Scope of PRA Request

2 Plaintiff submitted the following PRA request to the City of Asotin on May
3 20, 2009:

4 We ask that you provide copies of all complaints made against
5 office[r] Reed, all internal investigation reports, all training records,
6 all evaluations and any other report or tangible inner office notes
made regarding Officer Reed including but not limited to the
Investigative report of the outside investigator from Walla Walla.

7 ECF No. 32-6.

8 The City responded to Plaintiff's request on June 16, 2009, by submitting
9 115 pages of responsive documents. ECF No. 42 at ¶ 14. The City's response,
10 however, did not include two email messages dated May 11, 2009, and May 20,
11 2009. ECF No. 42 at ¶ 20. The May 11th email is a message authored by City of
12 Asotin Mayor Defendant Jim Miller. It reads, in pertinent part:

13 I met with [Shannon] Grow to hear her concerns [about Plaintiff]³ a
14 few weeks ago. Ms. Grow apparently wishes to add to her complaint.

15 ³ Although this message does not specifically reference Plaintiff, it was written in
16 response (*i.e.*, was a "reply" to) an email from Ellen Boatman to Mayor Miller
17 which reads: "When you get a chance, give me a call concerning Shannon Grow,
18 the lady you met with *concerning Lee*." ECF No. 40-1 (emphasis added). When
19 read in this context, Defendant Miller's response can be understood to reference
20 Plaintiff.

1 I wish to avoid the appearance [of] special access and would like one
2 of the committee members (Vikki or Mervin) to meet with myself and
3 Ms. Grow. We can discuss this matter further this evening. This
may be one for executive session . . . [City Attorney] Scott [Broyles]
can advise.

4 ECF No. 40-1.

5 The May 20th email is a follow-up message from City of Asotin Clerk /
6 Treasurer Ellen Boatman to Defendant Miller. It reads:

7 Jim – Vikki is ill and cannot make the 4:00 pm meeting today with
8 Shannon Grow. Would you like me to contact Mervin and see if he
can make it or would you like me to reschedule?

9 Defendant Miller responded:

10 Please reschedule . . . ? Tuesday. You may inform her of [Plaintiff's]
11 departure if she still sees a need of meeting.

ECF No. 40-1.

12 Defendants contend that these two emails are beyond the scope of Plaintiff's
13 public records request. The Court disagrees. Contrary to Defendants' assertions,
14 these emails are not "simply scheduling notes concerning meetings." ECF No. 39
15 at 15. Rather, these emails memorialize the fact that a citizen who had previously
16 complained to the City about Plaintiff wished to either make additional allegations
17 or expand the scope of her existing complaint. Although the email is not a
18 complaint against Plaintiff in and of itself, it does memorialize the fact that an
19 additional or new complaint had been or was about to be lodged. It also qualifies
20 as a "tangible inner office note[] made regarding Officer Reed." As such, the

1 email falls within the scope of Plaintiff's records request and should have been
2 produced. Defendants' motion for summary judgment on this claim is denied.

3 **D. FLSA, FOIA, Breach of Contract, and IIED Claims**

4 Plaintiff indicated in his briefing that he is no longer pursuing claims under
5 the Fair Labor Standards Act or the Freedom of Information Act. ECF No. 34 at 2.
6 His counsel further indicated at oral argument that Plaintiff has abandoned his
7 claims for breach of contract and intentional infliction of emotional distress.
8 Accordingly, these claims will be dismissed.

9 **ACCORDINGLY, IT IS HEREBY ORDERED:**

10 Defendants' Motion for Summary Judgment (ECF No. 28) is **GRANTED in**
11 **part** and **DENIED in part**. Plaintiff's claim under the Washington Public
12 Records Act will proceed to trial. The following claims are dismissed with
13 prejudice:

- 14 1. Minimum Wage Act;
 - 15 2. Violation of Civil Service Rules (Wrongful Discharge);
 - 16 3. Fair Labor Standards Act;
 - 17 4. Freedom of Information Act;
 - 18 5. Breach of Contract; and
 - 19 6. Intentional Infliction of Emotional Distress.
- 20

1 The District Court Executive is hereby directed to enter this Order and
2 provide copies to counsel.

3 **DATED** this 11th day of January, 2013.

4 *s/ Thomas O. Rice*

5 THOMAS O. RICE
6 United States District Judge